

**LOLLIPOPS, LAYER CAKES AND FLYING FREEHOLDS  
RECIPROCAL EASEMENTS, RESTRICTIVE COVENANTS, AIR SPACE DEVELOPMENTS  
IN COMMERCIAL/OFFICE/MIXED USE DEVELOPMENTS**

**DOCUMENTATION AND OPERATIONAL CONCERNS**

**Airspace Subdivision Project Development**

**David M. Van Atta\***

**INTRODUCTION / A HISTORICAL PERSPECTIVE**

Development within air rights or air space separately from the land surface of a parcel of real property has evolved in form and complexity in the course of the last fifty years. Since the early part of this century, development of air space separately from the subjacent earth, and the legal discussion thereof, focussed on the concept of developing a structure in air space above land currently owned and occupied by an existing improvement, particularly above railroad rights of way in the urban environment.<sup>1</sup> In more recent times, the evolution of the development and utilization of airspace has resulted in large scale mixed-use development projects within an integrated site, involving multiple ownerships within the same building or in physically interconnected structures.<sup>2</sup>

In his discussion of air space development which had occurred in Chicago, James J. Brennan described the development of the Prudential Building within air rights over the Randolph Street Suburban Station of the Illinois Central Railroad. He describes four different legal methods of development of such

air rights projects: (1) a leasehold method; (2) conveyance of all airspace above a plane; (3) use of a three dimensional plat; and (4) conveyance of the entire parcel to the developer with exception and reservation of an easement for the existing railroad tracks, structure, appurtenances of the railway station.<sup>3</sup> He then elaborated upon what was then a unique fifth alternative approach which was used for the Prudential Building. In this instance the railroad desired to maintain ownership of the fee to its improvements. Prudential required ownership not only to a fee in the airspace in which its improvements were to be situated but also to the areas of supporting columns and foundations, rather than having easements with respect to these elements. His article examines the intricate matters of describing the airspace involved and the subdivision plat problems which were incurred. The result was "not only a subdivision in the sky composed of lots of air but also a subterranean subdivision composed of lots of earth." In his original article he warned that such a scheme can be expensive, time consuming and inflexible. Reflecting twenty five years later, Mr. Brennan concluded that notwithstanding the complexities, he was pleased to report that the project succeeded notwithstanding the detailed and precise mathematical and geometrical legal descriptions required to create such a three dimensional subdivision. However, he cautioned that use of such intricate

schemes should be utilized only where absolutely mandated, where no other alternative is available.<sup>4</sup>

### **Modern Application and Adaptation**

In subsequent years, the economic necessities of the urban marketplace in particular has called upon the ingenuity of real estate developers and their attorneys to devise more intricate concepts of air rights or air space divisions and development.<sup>5</sup> Projects are now conceived in several layers of separately owned space; often divided on the basis of distinct uses. There may be a subterranean level used for parking owned by a separate entity or perhaps by the municipality. Some subterranean space may be used for rapid transit, railway or other transportation uses as well, harkening back to the original air space developments. Separate legal ownerships and structural space can be allocated to retail elements, office increments, and residential portions, each of which may even be further resubdivided into separate condominium projects with respect to the internal affairs of the separate components. Other potential separate uses and ownerships may be for a hotel project within the building structure. In San Francisco, the Mandarin Hotel occupies the top several floors of First Interstate Center, a forty-five story building situated at 345 California Street, which is otherwise divided into office building and retail components.<sup>6</sup> In Chicago, a number of high-rise, mixed-use projects have been undertaken

which involved airspace subdivision; for example, both the Ritz Carlton Hotel and the Four Seasons Hotel occupy several of the central floors of large scale, mixed use projects on Michigan Avenue, each of which also have separate commercial components at various levels and several stories of a separate residential condominium project.

In New York City, an example of a major air rights subdivision project is the United Nations Plaza development in Manhattan, consisting of "a base building devoted to commercial use, surmounted by two high-rise towers....The air rights parcels were established by two separate deeds, containing a three-dimensional description of the space lots."<sup>7</sup> The residential towers were established as two separate cooperative housing corporations. A series of easements and a collateral reciprocal agreement spelled out the respective rights and duties of the eventual owners of the three separate parcels, operated as a single entity.<sup>8</sup>

#### **LEGAL ISSUES INVOLVED**

There are a variety of legal issues involved with creation and operation of commercial, office and retail developments with multiple owners. The inclusion of a residential component, particularly where the residential units are sold as separate condominiums or cooperative apartments, compounds the legal, regulatory and administrative issues.<sup>9</sup> These

projects entail creating vehicles or mechanisms by which transfers or conveyances can be made of distinct ownerships in portions of the building, or buildings, or of a larger project. The ownership divisions might be either, or both, vertical or horizontal in nature, and could entail various different types of air space severance and subdivision.

The establishment of such a project requires documentation which, among other things, designates the different ownership interests, establishes a mechanism of governance among the various ownership parties as to areas of joint use and or control, sets forth a mechanism for budgeting and collection of funds necessary for operation of the overall project and designates rights, limitations and other restrictions pertaining to use and occupancy of the property.

### **Approaches**

In the past, divisions of property for commercial purposes has generally been undertaken by the legal mechanism of land and/or airspace conveyances accompanied by reciprocal easements. In some jurisdictions, the airspace parcels are established by a platted air space subdivision map or plat filed with the local government agency as any other subdivision of land with similar reciprocal easement arrangements.<sup>10</sup> In more recent times, condominium or other common interest ownership methods have been used for

development of mixed use, multiple owner projects.<sup>11</sup> The complexity of the legal approach seems to know few boundaries, encouraged by the inventiveness of the project designers and marketeers. Truly, need seems to be the instigator of ingenuity. Particularly in the more crowded urban setting, where competing land uses are compelled not only to co-exist in close proximity, but often within the same structure, legal arrangements have had to be devised to enable the business and planning purposes of the developers and land users to become a reality.

Historically, when the nature of these projects were, perhaps, a bit simpler, the most common approach was to use air space conveyancing deeds to create separate planes of ownership,<sup>12</sup> and then devise a scheme of reciprocal covenants for handling joint use of certain areas of the building and/or the land accompanied by deed restrictions or a separate declaration of covenants to provide for restrictions pertaining to use and operation of the development and its separate parts.

Although the use of condominium regimes and similar common interest programs might be a feasible manner to create such projects, this may not always be the case because of the potential of involving state or local regulatory laws which were envisioned for residential projects.<sup>13</sup> However, legal counsel, in choosing a vehicle for establishing the airspace

development project is cautioned to be aware of the impact of state statutes which govern specific types of developments in the state, such as condominiums or common interest developments. The definitions set forth in these statutes are often so broadly worded as to encompass projects which were not specifically intended to be governed by the provisions of the statute. Some statutes have express exemptions for nonresidential projects, others may require that the project be expressly excluded from the application of the statute.<sup>14</sup>

#### **Goals for Documentation**

The legal documentation for a multi-story mixed use multiple owner development must accomplish several different goals. One of these goals is to establish the separate ownerships of the project. This could either be accomplished by creating deeds of conveyances with respect to different airspaces with the airspace being defined by legal descriptions on a three dimensional basis, or by legal descriptions which reference the airspace as platted on a subdivision map creating a vertical subdivision [the so-called "layer cake" or "flying freehold" approaches], or by reference to a condominium plan which designates the various airspace parcels.<sup>15</sup>

The project, of course, is created within the scope of an ongoing process of land use approvals with the local government agencies. The development team would have to

assure that the method of dividing the airspace complies with the requirements of the local government requirements. In particular, inquiry should be made as to whether some type of a subdivision or plat map must be processed with the local government with respect to the division of the airspace.<sup>16</sup>

The documentation for these types of projects becomes almost unwieldy at times. The drafters are compelled to consider so many interrelationships and interconnected issues, that it becomes a herculean task to complete the effort with a document which is both as comprehensive as it should be and, at the same time, is useful to, if not just plain comprehensible to, the ultimate users. The more important of these various issues to be covered by the project documents are reviewed in more detail later in this article.

#### **Nature of Air Space Divisions**

As the airspace is to be divided and conveyed to multiple owners, rights of use over various common elements and facilities of the building will have to be established. For instance, consideration will have to be made for how elevator and for utility systems. In some buildings, these facilities are discreet with respect to the different ownerships. There may be separate entrances, elevator shafts and main utility systems which run from a common initial facility to the various components of the building structure. In these



instances, subdivision maps or deeds often will show the area for access of these facilities as extensions from the particular floors or areas of the building which are separately owned to the common location. Such may be either designated as easements or as part of the fee ownership as extensions from a particular airspace ownership. A parcel or subdivision map for such a building might look like a series of parcels layered on top of each other with projections extending down to the basement area for elevator and utility extensions, giving rise to the expression "lollipop" developments.

In recent times, the lollipop development has been extended in its utilization.<sup>17</sup> Where there is an existing building which cannot be removed, either because of historical landmark status or other compelling reason, the landowner may desire to develop additional facilities above the existing building. In this situation, the developer essentially is developing the airspace situated above the existing building as a separate structure on the same parcel of land, perhaps with certain tie ins with respect to the existing building for structural support and access for a variety of different utility installations. Therefore, from a vertical view, you would have a separate airspace parcel for the existing structure, and a separate air space parcel for the new structure. The airspace for the new improvements could be divided, or

subdivided, into more than one airspace ownership. Extending from the airspace for the new structure, through or adjacent to the old structure to the ground and/or basement, would be a stem-like protrusion through which access for location of elevators, stairways and various utility facilities would be provided. This stem for access of such facilities could be created as a reciprocal easement, an exclusive easement, or as an extended portion of the fee of the airspace parcel of the new structure.<sup>18</sup>

**Condominiums and Mega-units.**

As the concept of condominium development has gained acceptance, both as a legal format and from the commercial viewpoint, the condominium legal form has been used to structure large scale mixed use projects. Essentially, the legal concept is to create large condominium units encompassing each of the separate components of the project, such as the residential portion, the office portion, the retail portion, the hotel increment, the parking garage and what other different uses might be appropriate for separate designation. These units might be referred to as "mega-units" to distinguish them from individual units to be owned and occupied by separate users. Mega-units can be "resubdivided" into such smaller increments of units for individual sale and use. One potential advantage to the condominium approach may be in structuring the project

documentation. Traditional documentation for condominium projects can be adapted to encompass the concept of the "Mega-unit" approach. This type of approach may be more acceptable to title companies and other parties than using the somewhat less familiar approach of air space divisions accompanied by cross easement agreements and agreements for use and maintenance. A possible disadvantage to using the condominium regime to create such a division of a building into separately owned blocks of different uses may emanate from the laws for establishing and regulating condominiums in the particular state in which the project is located. The project proponent would have to establish if the laws in the relevant jurisdiction pertaining to condominium development, marketing or operation would have unwanted aspects that would not impinge upon the proposed project if it were established using another method for dividing the airspace.<sup>19</sup> Application of rules generally applicable to condominium projects may be applied to the project which may not be advantageous in the proposed scheme of development. Inadvertent application of such laws may create an undesired result. Some state statutes have express exemptions as to the application of all or part of the regulations generally applicable to condominium projects for nonresidential projects.<sup>20</sup>

**The "Vertical PUD" - Common Interest Developments.**

In those states which have adopted the Uniform Common Interest Ownership Act ["UCIOA"], or a similar statute, it is possible to create a mixed use high rise development in a manner which might be preferable to the platted air space subdivision or the condominium, as a "vertical PUD". UCIOA is seen as providing statutory authority for the vertical PUD as "a new scheme of ownership for common areas of multi-tenant buildings that should prove superior to the tenancy-in-common arrangement required in the condominium."<sup>21</sup> By the use of this technique, potential technical difficulties and political incongruities which might be faced in attempting to deal with conforming the subdivision map or plat for a high rise, multiple ownership, air space subdivision development with the state and local platting laws might be avoided. The description of the various separately and commonly owned increments of the project would be set forth in an attachment to the declaration which creates the common interest regime, in a manner similar to that often employed for establishing a condominium development. By this method, the common areas would be owned by an association rather than by tenancies-in-common, which might be advantageous from several aspects, including ease of administration, insulation from tort liability and title issues.<sup>22</sup>

**Operational and Management Concerns**

With the creation of separate airspace ownerships, the project documentation must establish the system for operation of the overall facility and responsibilities for the various increments which constitute the overall project. Although some portions of the project might be discreet to each of the particular units of airspace ownership, such as independent elevator lobbies and shafts for elevator cabs, independent utility facilities, and, at times, separate facilities for heating, ventilating and air conditioning, there are almost invariably some base facilities which are common to all of the units of ownerships, including the roof areas, the building exterior, common area lobbies and similar such areas. The project documentation must spell out who has responsibility for what particular facilities, and how decisions will be made with respect to the budgeting, management, maintenance, operation, and replacement of these facilities over time.

Provision will have to be made for allocating the costs for management maintenance, repair and replacement of these common facilities. Furthermore, there needs to be some type of enforcement mechanism with respect to the owners of the various discreet portions of the building fulfilling their obligations to use, operate, maintain, repair and replace their discreet facilities and systems in a manner that will maintain the integrity of the overall project.

A matter which often requires special attention in drafting of project documentation is parking facilities and structures. Frequently, the parking portion of the underground area of the building is a separately divided airspace with separate ownership. In some instances, this separate ownership is conveyed to the municipality for operation as a garage facility. In other instances, it is sold and/or leased to a separate entity for operation as a separate business enterprise. The airspace with the garage structure also contains many of the building operating components such as HVAC and elevator facilities. Certain exclusions or easements with respect to these types of facilities will have to be made to separate those facilities from the garage areas.

**Management structure.**

In creating the mechanism for decision making, the drafter of documents must anticipate areas of potential conflict and attempt to design a management system which best avoids such difficulties. Particularly where the building or project contains a residential ownership element, as well as commercial, office and/or retail elements, it may be important to consider creating separate decision making processes or bodies for the residential element, at least for those aspects which do not mandate common involvement of all portions of the project ownership. Separate associations or subassociations,

for the residential increment is often advisable. Project components which require contribution of all of the ownership for payment of their maintenance and operation should be the subject of some type of joint powers agreement, master association or other joint decision making process.<sup>23</sup> The difficult challenge is developing a reasonable formula or process for allocation of costs and the weight of the voting rights for each of the various project increments.

#### **Use Restrictions**

Additionally, in projects of this nature, use restrictions will be necessary with respect to the various increments, as well as with respect to the common areas that are used by the various separate unit ownerships. Crafting documentation for the mixed use development entails some degree of sophistication from the viewpoint of drafting language which covers critical and essential matters, but does not constrain the use of occupancy in a way that will be detrimental to the value of the different separate ownerships. Thought must be given to the enforcement mechanisms for such use restrictions, particularly in the mixed use context where there are residential as well as commercial types of uses. As discussed above, a separation of the administrative processes for the different aspects of the development is advisable. Commercial owners will not want to be subject to changes or enforcement by the owners of the residential component.

**ANALYSIS OF DOCUMENTATION**

The issues and concerns to be covered by the drafter of documentation for a mixed-use, airspace development will vary depending on the intricacies of the project and the variations in number and types of owners and users. The challenge to the drafter is to encompass that which is legally and operationally necessary, on the one hand, but not be so overly comprehensive as to create a document which is neither comprehensible or adaptable to changing circumstances. Notwithstanding the need for creativity to adapt documents to projects of differing types and range of complexity, some basic guidelines can be delineated. The following discusses in more detail some particular areas of drafting concerns for documenting such a mixed use airspace development.

**Basic Format**

The project documentation usually is a reciprocal easement agreement, a declaration of covenants, conditions and restrictions, or a combination of both of these instruments, either as separate documents or combined into one omnibus agreement. The form and general content for such documentation is often similar to the declaration of covenants, conditions and restrictions or "enabling declarations" used for creation of condominium projects or planned unit development projects. In fact, there may very well be a layering of documentation when the development has



portions of its separate areas divided again into subownership categories, such as residential or office condominiums within a part of the distinct air space modules.

### **Project Description and Definitions**

The nature of the description of the various components of the project will depend on the determination of the basic legal structure chosen for the project, whether as air space lots, a condominium regime, a vertical planned development or some other variation. The separate ownership interests may be specified as conveyances of three dimensional parcels described by vertical, as well as horizontal, metes and bounds, or, more commonly, as air space parcels or units by reference to a separate subdivision map or plat or condominium plan. In setting forth distinct areas of individual ownership and operation and common ownership and operation, the legal implications of various potentially applicable state laws must be contemplated in the drafting exercise. A development may inadvertently, by the nature of its components and its description, be included under a statute for common interest development or ownership, imposing various regulatory and administrative consequences.<sup>24</sup>

It is imperative that the drafter consult with not only the developer, but also the project architects and engineers, at the earliest possible stage, to obtain an understanding of the

intended scheme of ownership and operation, the interrelationships among the various separate ownerships and the nature of the various project facilities, and to provide insights early on as to the legal complexities involved in preparing the necessary documentation. It may be important to become involve local government officials who will have oversight of the development as well. It goes with out the necessity of saying that representatives of the potential title insurer must be consulted at the earliest point in time to discuss the intricacies of this type of development and the requirements of the title insurer.

#### **Easements**

Pertaining to providing easements for support, access and use, one practitioner noted:

The separations of portions of the mass from the balance of the property frequently create the same problems of life support as when a spaceman leaves his spaceship during space flight. He must either maintain a life support connection with the mother ship, or make a new connection with some other means of life support. So it is, too, with a space parcel - it must have life support in the form of a means of access and a means of physical support<sup>25</sup> for any structure that will occupy the space parcel.

Non-exclusive reciprocal easements must be provided for support of each of the separate building structural components to each of the separate interest holders over and across relevant portions of the project not owned by the separate interest holder. Additionally, non-exclusive easements for use of commonly used facilities, such as common systems,

service and deliveries, utility systems and service systems, parking areas, and wall systems, must be provided, as well as for pedestrian and, if applicable, vehicular, access. Exclusive easements, for areas which are to be restricted exclusively for the use of one particular ownership over and across other areas of ownership, also need to be provided. One of the more complex aspects of the documentation may be the designation of the particular location of some of these easement areas. Although some easement rights, such as support and general access can be created by general verbiage in the document, without having to detail the precise location, for exclusive easement areas and those non-exclusive easements through another airspace which is to be of limited impact, such as access through specific lobbies and corridors, lobbies, utility systems, mechanical rooms and the like, more precision will be required. Identification of these specific easement areas is usually accomplished by reference to areas designated on a detailed map or project plan. It is important to provide for alteration or modification or possible relocation, of these designations in the future operation of the project. Some areas commonly subject to the creation of exclusive easements include: separate building systems, private access corridors, separate use areas, such as balconies, patios and decks. Additionally, provisions must be made with respect to potential encroachments of portions of one separately owned element upon another or upon commonly

owned or used elements. In designating the party or parties who will have operational management and control, care needs to be taken to provide for rights of access over separately owned portions for undertaking designated activities. There may be a need to identify limitations on such access for maintaining integrity or privacy of occupants of these separately owned portions. Easements should include access for major components used by one owner for facilities situated in other portions of the building, such as elevator facilities situated in the basement or chillers and other components of heating and air conditioning systems situated on the roof. Designate who is to maintain operate and repair various easement areas and how costs are to be allocated.

#### **Use Restrictions**

Drafting use restrictions for commercial/office properties is much less proforma than for residential projects. Where there are other uses combined with commercial and office uses, particularly residential uses, the mechanisms for adopting and administering the use restrictions is more difficult. Developers of nonresidential projects are concerned that overly restrictive use provisions will limit the marketability of the product they will have to sell and may not be broad enough to allow for new commercial, office or other business uses within the building for which there may be an interest in the future. The occupants and owners of the nonresidential

and residential portions of a mixed-use property may have their own expectations as to the degree of flexibility of uses and limitations on types and natures of uses to protect their own use and comfort, and also, as owners of separate interests, their long term investment in the property. It may be advisable to separate the enforcement of use restrictions among different aspects of the project, through the use of subassociations, or similar mechanisms.

Areas of preeminent concern in the current context will include use and storage of hazardous substances, revisions or activities which require modifications of the structure, such as the Americans with Disabilities Act, creation of variances in the physical requirements of the property, such as parking requirements. The drafter must focus on the specific interrelationships within the building or buildings as the uses and occupancies are perceived by the project proponent, to evaluate if specific limitations and prohibitions are warranted. The drafter must recognize that there must be an enforcement mechanism which is fair, reasonable and workable. Often in the nonresidential development, the project proponent desires to be, at least initially, the arbiter of disputes and the administer of claims of violation. This may not be a particularly wise course to follow.

**Maintenance and Repair**

As the project is broken into several ownership increments, decisions must be made at the outset as to who is to be responsible for undertaking the maintenance, repair and replacement of the different physical components of the project and how such responsibility is to be administered. There may very well be a variety of levels of maintenance and repair concerns. In a complex project, there may be several buildings, as well as a variation of levels within a building. Generally, the responsibility for the overall structural integrity of a high rise building can not be divided and handled by several different ownerships. Either an entity, with a well conceived decision making structure, must be established to handle this responsibility, or, one owner of the collective ownership must be delegated the responsibility with the right of assessing the other owners for their proportionate share of the costs. As is discussed in a later section of this article, there are several different governance structures which might be considered. If maintenance and repair responsibilities for portions of the project are delegated to individual ownership interest, a mechanisms for enforcement of these responsibilities is required. Consideration should be given to the appropriateness of adopting a system of fines and liens in this context, and as to whether "self-help" provisions in documents can be enforced under the applicable state law.

**Construction, Alterations, Remodeling**

The drafter of project documentation should consider what types of controls are needed with respect to construction within the various subcomponents of the project. Where the work is structural in nature, visible from the exterior or will involve common operational elements of the project, some type of controls will be required, under the auspices of the overall project management. A fair, efficient process for review, approval and oversight of proposed construction work needs to be established. A mechanism for determining and enforcing remedies for violations of these requirements also must be formulated. When drafting documentation for a high-rise mixed use building, consideration should be given as to the necessity and appropriateness of establishing a process for review and approval of non-structural, interior work within a particular component, and who should be responsible for carrying out this review. It may be preferable to have at least the initial responsibility for much of this review and oversight delegated to a particular ownership component.

**Assessments**

A principal area of concern will be how to allocate the costs of operation, maintenance and repair of various different components thorough out the structure or structures, and how to collect the assessment of such costs. An initial step will be to determine what matters are "project wide", matters of

concern which will be charged on some type of basis to all ownership increments, and what matters are discrete to certain particular ownership interests and are to be charged only to those interests. It may be that a central management authority will be responsible for undertaking the operation, maintenance and repair of a particular physical aspect of the building; however, such does not mandate that all of the ownership interests pay for the costs of this activity if the benefit inures only to a particular ownership interest or interests. The method of allocation of costs for those allocated across the board to all ownership interests should consider whether one ownership interest gets a greater benefit than any of the others, or by its nature creates a greater burden. Otherwise a formula based upon relative square footage is the most often utilized system of allocation.

Enforcement of payment usually entails a noticed assessment and stipulated payment period. The key issue is how to effect payment in event of default. If the project is conceived in the condominium format, establishment of lien rights may be relatively easy to accomplish by following the relevant state law for condominium regimes. However, if the project is not a statutory condominium, but divided by some other legal mechanism, the drafter must evaluate whether there is statutory authority or other legal basis for implementing a lien on the delinquent ownership interest for failure to pay



the assessed charges. Analogy may be made to the documentation used for creation of planned development common interest developments where lien rights are frequently imposed in the project documentation and established as affirmative covenants running with the land. Some states, such as California, have established clear legislated authority for imposing liens for collection of common area maintenance matters for common interest developments which are not condominiums. Other jurisdictions, following Uniform Common Interest Development Act, have similar statutory authority which may be applied to the projects to which this discussion pertains. Without an established lien right in the documents, then the obvious enforcement is through judicial proceedings on the debt and the subsequent seeking of a judgment lien through enforcement of the monetary judgment. Priority issues obviously result. An ancillary, but important issue is to establish whether the lien for such delinquent expenses primes the mortgage lien or liens on the ownership interest or interests involved and the drafting of appropriate mortgage protection language to assure that the ownership interests are financable.

### **Project Governance**

A question to be contemplated by the drafter of project documentation is whether there should be a formal entity established for governing the project. Where the number of

different ownership interests are relatively few, such as two or three in number, and the matters of common involvement are straight forward, then such separate governing entity may not be necessary. However, under the laws of some states, the project structure may mandate the formation of some type of formal governing entity.<sup>26</sup> The documents will have to provide a system for decision making as to matters of common involvement among the various ownership interests. A degree of tension may develop as to what matters will involve collective determination and how such decisions would be reached. Day to day operational matters must be differentiated from major decisions requiring such collective input and consensus. In most instances one party must be given the responsibility and authority to operate the premises. An initial budgeting process instigated by what is conceived as the controlling owner, and an annual review thereof by the other ownership interests should suffice, except for major, nonrecurring type items. Apart from operation of the common areas of the premises and collection of proportionate shares of the costs thereof from the separate ownerships, the most important area of common involvement pertains to the issues of construction matters, such as alterations additions and maintenance and repair by individual ownership interests of separate elements. Whether a separate entity is necessary to oversee and enforce responsibilities in this regard is also a matter of some concern. Such matters

can be subject to an appointed committee of representatives of the ownership interests, with the voting rights of such representatives weighted to reflect some sort of identity of interest. However, it may be preferable to have one ownership interest with the authority with respect to such issues, subject to some type of oversight or arbitration in the event of disputes.

In certain, and probably most, instances, it will be warranted to organize a management structure involving a separate entity for overall project management and operation, as a project association. Where there are many different ownership interests, such as a project with separate residential units and several other individually owned increments, with perhaps subdivided retail or office units as well, a structure with individual ownership associations, operating collectively under an umbrella association or under some type of joint powers agreement may be the appropriate structure.

#### **Damage and Destruction**

As with any multiple ownership property or project, the mechanism to be used where there is either partial damage or total destruction of the building structure must be contemplated. This must be coordinated with the insurance provisions contained in the project documents. Anticipation of the requirements of mortgagees of individual components is

also necessary. It is difficult enough to have to deal with a disaster such as a high rise fire, or earthquake damage in the context of a commercial property occupied by tenants under long term occupancy leases. Issues are greatly compounded when there are multiple ownerships within the structure.<sup>27</sup> In order to accomplish the requisite decision making, clear guidelines for who and how to deal with specific circumstances needs to be laid out.

Definition of what events are major events of damage or partial destruction which dictate collective or collaborative involvement is necessary. Where the damage is limited to a distinct separately owned portion of the structure the main concern will be that the ownership effects the necessary repairs with dispatch in a manner which causes as little inconvenience to the other ownerships in the property and imposes no cost or obligation on the other ownerships. Where the damage involves commonly owned or used features, the decisions regarding effecting repair and payment for the costs of repair becomes more of an issue. Particularly in events where insurance proceeds are inadequate to cover the expense of repairing commonly owned parts of the projects, or where there is a need to obtain reimbursement from other owners for repair of common portions, a process for making the decisions as to effecting the repairs and obtaining the funds to make the repairs is needed. If one ownership party does not want

to proceed with reconstruction, a method must be devised to allow for rebuilding for the remainder of the project. The documentation must foresee potential disputes as to the desirability of proceeding. The availability of insurance proceeds for each segment of the project is critical and must be subject to periodic review. Use of available insurance proceeds must be controlled. A tie in between the availability of insurance proceeds or the lack thereof and the obligation to proceed with reconstruction is important; mandate going ahead to rebuild unless proceeds are insufficient by a stated formula. If one ownership entity does not desire to go ahead, but others do, some understanding should be set forth as use of available insurance proceeds, even of the entity which chooses not to proceed, to, at a minimum, make it possible to rebuild if feasible, should be set forth. Failure of an ownership interest to pay its allocable share should give rise to lien rights for the balance of the interests to foreclose on the air rights interest of the ownership in default.

#### **Real Property Taxation**

An issue to be reviewed is whether the air space parcels created by the proposed documentation will be separately assessed and taxed. Although condominium statutes generally provide for separate assessment and taxation of condominium units, this may not hold true for other types of air space

subdivisions. Real property ad valorem taxation statutes generally do not contain provisions for separate taxation for air space parcels.<sup>28</sup> If this is the case in the jurisdiction where the project is located, or if the issue is subject to ambiguity or uncertainty, then the project documents must provide for a reallocation of taxes assessed to the project to the separate air space parcels and a mechanisms for the owners to enforce payment by the other owners in event of default of one of the owners.

#### **Title Issues**

Air space developments generate many concerns for the title insurer. These include whether the air space is adequately defined, whether there has been provided appropriate and adequate easements for access and support.<sup>29</sup> Another title related issue pertains to mechanics liens which might be imposed upon the property because of work undertaken or materials furnished within the real property boundaries. This can especially be a problem where work is being undertaken in both an air space parcel and a subjacent parcel.<sup>30</sup> To avoid a lien one part of the project affecting the entire property, project documentation must be carefully drafted. Utilization of the condominium format may be preferable in some states where the statutes clearly set forth that work with in one condominium unit does not create a lien right as to other condominiums in the project. The project documents should

clearly create a duty upon owners of separate interests not to create liens upon other separate interests or the common interests, and remedies to be employed if this duty is breached.

#### END NOTES

- \* **David M. Van Atta** is a member of the firm of Graham & James, San Francisco, California.

1. Brennan, *Lots of Air - A Subdivision in the Sky*, 24 REAL PROP. PROB. & TR. L. PROC. (1955), reprinted in REAL ESTATE IN MIDCENTURY 928 (American Bar Association 1974) [hereinafter "Brennan"]. See generally, R. WRIGHT, *THE LAW OF AIRSPACE* (1968). Professor Wright sets forth a historical perspective on English legal evolution as to ownership of land as inclusive of everything above the land, *Cujus est solum, ejus est usque ad coelum*, [whoever has the land possesses all the space upwards to an indefinite extent] as the maxim of the law, citing 2 Blackstone, *Commentaries on the Laws of England* Ch 2, at 19 (p.445 in Cooley ed. 1899), at pages 12-30. The American adoption of this legal maxim is discussed by Professor Wright at pages 31-65.

In his treatise, exploring the law of airspace, in particular considering airspace conveyances for separate development over railroad and highway rights of way and the conflicting issue of aviation rights as perceived in 1968, Professor Wright, in discussing the genesis of law of air rights, cites the historical example of certain additional chambers being added as upper rooms or stories to the Inns of Court to be held in separate ownership as life tenancies whereby "the English bench and bar was accustomed to think of the ownership of these chambers as ownership of a freehold estate in land." He provides the following reference to Coke on Littleton 48b(1628) wherein "Lord Coke stated matter-of-factly that 'a man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall pass by livery'." R. WRIGHT, *supra*, at 69. Professor Wright then states that the concept of a freehold in an upper chamber or in a single room of a larger structure moved into American law effortlessly. *Id.* at 71. He provides a number of examples of cases from the early and middle of the nineteenth century, stating the conclusion that "[t]hese early cases established clearly the concept that separate freeholds were owned, even when in the same building." *Id.* at 74.

2. Another air rights subject, which is beyond the scope of this discussion, has evolved extensively over the past twenty-five years. This pertains to transferable air rights or more as more appropriately denominated transferable development rights or "TDR's". TDR's are essentially a land use control and planning devise whereby the right to further develop the airspace on one parcel is constrained and such rights are transferred to another parcel within the community to allow greater development on the parcel to which such rights are transferred than existing zoning would otherwise permit. A good compendium of materials on this subject is collected in *AIR RIGHTS, AIR SPACE, AND TRANSFERABLE DEVELOPMENT RIGHTS*, Practising Law Institute (1985). See, also, WARREN'S WEED NEW YORK LAW OF REAL PROPERTY, "Airspace Rights," §2.01 and §§4.01 - 4.08.

3. Brennan at 929. See also, WRIGHT, *supra* note 1, at 343-380.

4. Brennan at 935.

5. Although much of the discussion pertaining to this subject relates to "air rights", as Mr. James Brennan stated, the better terminology is the development of "air space." *Id.* at 928.

6. In fact, the office building component is further divided into condominiums for separate ownerships by the office building developer and a major lawfirm.

7. WARREN'S WEED NEW YORK LAW OF REAL PROPERTY, "Airspace Rights," §3.01.

8. *Id.*

9. See, generally, HANNA, JOHN P., CALIFORNIA CONDOMINIUM HANDBOOK 2D. Bancroft-Whitney Co. 1986, §§ 6.2, 6.7, 6.8, 6.9 and 6.10.

10. In some states, it may be legally required to process a subdivision or plat map with the appropriate local governing agency. See, for instance, California Government Code Section 66424. See, Pedowitz, *Transfers of Air Rights and Development Rights*, 9 REAL PROP., PROB. & TR J 183 (1974) at 188.

11. Excluded from this discussion are ground leases and other lease vehicles.

12. See, BUSINESS, COMMERCIAL AND MAJOR RESIDENTIAL PROPERTIES, Vol. 3, Matthew Bender, §8.42[1] Form 8-9: Air Space Deed and §8.42[2]: Sub-Surface Deed.

13. See *infra* text accompanying notes 17 and 18.

14. See, Richard J. Wirth, *The Uniform Common Interest Ownership Act Nonresidential Use Exemption: When an Out May Not Be an Out*, 26 REAL PROP. PROB. & TR. J. 885 (1992).



15. The complexity of these projects may vary enormously. Although a verbal description of the boundaries may suffice for a relatively simple project, it is submitted that in most situations, a pictorial, or diagrammatic plan is essential to display the physical location and interrelationship of the various project component.

16. In California, a division of land for purposes of sale lease or financing constitutes a subdivision requiring compliance with the California Subdivision Map Act. Government Code §§66410 et. seq. If five or more parcel are created, then compliance with the Map act will require processing a tentative and final subdivision map with the local governing agency to effect the subdivision. Government Code §§66426. Presumably, all of the distinct vertical and horizontal divisions of the land would be counted in arriving at the calculation of the number of land divisions or parcels created. If four or fewer parcels are created, then the subdivider will be able to process a Parcel Map, rather than a final subdivision map, thereby being able to avoid some of the more onerous provisions of the Map Act. Government Code §§66428. See, Tudzarov, *Platting the Condominium: Is It Required?* 15 REAL ESTATE LAW JOURNAL 22 (1986).

17. Mandel and Donohoe, *Using the Lollipop Condominium to Revitalize City Space*, 3 THE PRACTICAL REAL ESTATE LAWYER 55 (March 1987).

18. A form for creation of a lollipop condominium project is set forth and briefly described in ROHAN, PATRICK J. AND RESKIN, MELVIN A., CONDOMINIUM LAW & PRACTICE, Volume 1C, Appendix C-22. The project consists of the conversion of an existing three story residential rental building and, as a separate condominium project, the construction of two additional floors containing six duplex condominium units with an elevator shaft as the "stem" of the "lollipop". The authors state the key to the coexistence of the two separate condominiums sharing one building is the Declaration of Easements, Use and Maintenance whereby "the property of each of the two distinct condominiums is mutual easements of ingress, egress, utilities, support and maintenance, apportionment of expenses and establishment of a joint committee to enact and enforce rules and obligations imposed... for maintenance, repair, and replacement of the common area."

19. See, Rait, *Lollipop Condominiums: Air Rights, the Takings Clause, and Disclosure Under New York's New Guidelines*, 17 REAL ESTATE LAW JOURNAL 335 (1989).

20. For example, California Civil Code Section 1373, applicable to projects which are defined as common interest developments, specifies that particular provisions of the California Common Interest Development Act are not applicable to common interest developments that are expressly zoned as industrial developments and limited in use to industrial purposes or expressly

zoned as commercial developments and limited in use to commercial purposes. The provisions which are not applicable to such industrial and commercial projects pertain to: amendment of project documents by petition to the courts (Civil Cd §1356), distribution of certain documents by the association (Civil Cd. §1365) or by a selling owner (Civil Cd. §1368), obligations to review association accounts and limitations on expending reserve accounts (Civil Cd. §1365.5), certain limitations on the amount of assessments (Civil Cd. §§1366(b) and 1366.1) and preparation of budgets (Civil Cd. §1363(b). See also, Wirth, *supra* note 12, at 923.

21. BUSINESS, COMMERCIAL AND MAJOR RESIDENTIAL PROPERTIES, Vol. 4, Matthew Bender, § 10.01[4][a].

22. *Id.*

23. See HANNA, *supra* note 7, §§ 6.9 and 6.10.

24. See, generally, Wirth, *supra*, note 12. See Gurdon H. Buck, *Beware the Inadvertent Condominium: The Commercial Common Interest Community - Choices Under the Uniform Common Interest Ownership Act and Uniform Condominium Act*, 22 REAL PROP. PROB. & TR. J 65, 75 (1987).

25. Pedowitz, *supra* note 8, at 183.

26. In California, an airspace development will more than likely fall under the statutory definition of a "common interest development" in Civil Code Section 1352, and, as such, an association for the development, whether incorporated or unincorporated will be required. Calif. Civil Cd §1363.

27. Professor Wright provides an interesting discussion about attempts of various courts to wrestle with this issue from as early as the middle of the nineteenth century. R. WRIGHT, *supra* note 1, at 75-80.

28. *Id.* at 184.

29. See, *Id.* at 185.

30. *Id.* at 187.